From: Tom Berry
To: Microsoft ATR
Date: 1/15/02 1:59pm
Subject: Microsoft Settlement

To all whom these presents shall come, Greetings.

(Is that how it's usually put??)

Having reviewed the documents related to this case, please let me offer the opinion that they are a good start, yet insufficient to prevent monopoly abuse on the part of Microsoft (as they have demonstrated in the past; cf. the December 17, 1997 contempt motion). Further, let me suggest an additional remedy that should lessen the probability of such occurrences while remaining consistent with Microsoft's own claims of its innovative prowess. As you will recall, in the early phases of these trials, Microsoft chose to paint the picture that the case was about freedom to innovate. I believe my (admittedly partial) solution leaves them free to innovate and reap the benefits of any true innovation.

The remainder of this email speaks to Paragraphs 36 and 37 of the original complaint, which are:

36. Neither the antitrust laws nor this action seeks to inhibit Microsoft from competing on the merits by innovation or otherwise. Rather, the Complaint challenges only Microsoft's concerted attempts to maintain its monopoly in operating systems and to achieve dominance in other markets, not by innovation and other competition on the merits, but by tie-ins, exclusive dealing contracts, and other anticompetitive agreements that deter innovation, exclude competition, and rob customers of their right to choose among competing alternatives.

37. Microsoft's conduct adversely affects innovation, including by:

a.impairing the incentive of Microsoft's competitors and potential competitors to undertake research and development, because they know that Microsoft will be able to limit the rewards from any resulting innovation;

b.impairing the ability of Microsoft's competitors and potential competitors to obtain financing for research and development;

c.inhibiting Microsoft's competitors that nevertheless succeed in developing promising innovations from effectively marketing their improved products to customers;

d.reducing the incentive and ability of OEMs to innovate and differentiate their products in ways that would appeal to customers; and

e.reducing competition and the spur to innovation by Microsoft and others

that only competition can provide.

Microsoft has in the past established a particular modus operandi, to wit:

1) A potential competitor will develop an innovative product with the potential of material impact in the middleware arena.
2) Microsoft will purchase, license, steal and reimplement the concepts of the product, or simply infringe patents to incorporate the competitive technology into it's own product offerings. In the case of simply stealing someone's idea (e.g. Web browsers), Microsoft's operating system dominance then nearly guarantees the overtaking and ownership of the new technology's market. (If you would have evidence of this kind of behavior, especially my infringement accusation, let me suggest that some of the lawsuits brought against Microsoft whose records have been sealed be unsealed. Those cases that Microsoft wants left sealed the most will, I am sure, provide the richest examples.)
3) The threat being neutralized, Microsoft will cease any meaningful "innovation" and begin developing minor feature enhancements designed to drive revenue to Microsoft rather than provide value to consumers. (Witness the release of Word 6 on the Macintosh, which actually ran slower than its predecessor. This flaw was only corrected after massive publicity began to reflect poorly on Microsoft.)

However, the current settlement, especially the paragraphs:
"Nothing in this section shall prohibit Microsoft from entering into (a) any bona fide joint venture or (b) any joint development or joint services arrangement with any ISV, IHV, IAP, ICP, or OEM for a new product, technology or service, or any material value-add to an existing product, technology or service, in which both Microsoft and the ISV, IHV, IAP, ICP, or OEM contribute significant developer or other resources, that prohibits such entity from competing with the object of the joint venture or other arrangement for a reasonable period of time.

This Section does not apply to any agreements in which Microsoft licenses intellectual property in from a third party."

does not address the behavior I have described, where Microsoft essentially stifles innovation while claiming to be innovative.

Let me propose the following additions to the settlement:

Microsoft be prohibited from acquiring (or making a future agreement to acquire) any company or company's product, or purchasing anything more than non-exclusive redistribution rights to another company's individual product, for seven years. Also, they would be prohibited from making investments greater than, say, $20M in any company. Microsoft could not

possess copies of the source code for any software product not developed in-house, even under license. The actions of any company in which it made investments could not be restricted by Microsoft in any way, shape, or form.

Microsoft be prohibited from implementing technologies developed at any other company unless they adequately license someone else's patent. (I'd suggest a guideline of "adequacy" could be established, perhaps 3% of the product's gross revenues.) Possibly companies or individuals could also register their own innovations with an office of the Technical Committee (*not* located in Redmond). (Given that the Technical Committee will be on Microsoft's campus we have to assume that Microsoft would be able to read any database kept on its premises.) While this appears to duplicate the efforts of the US Patent and Trademark Office, the Technical Committee's innovation database could probably be updated more easily and would allow for the registration of product concepts, again the chief example being web browsers (registration would require the presence of a working prototype, of course). This does not constrain Microsoft from developing its own patents or ideas, indeed, it should encourage such "innovation".

Further, if Microsoft is found guilty in (or settles) a suit of patent or innovation infringement filed (not necessarily resolved) during the during the period of enforcement (listed as 5 years in the Settlement document, though I would suggest increasing this term to 7 years), punitive penalties should be 30-fold the original judgement or settlement (not the mere 3 times that I believe current law allows).

I believe that these additions to the settlements will encourage true innovative behavior on Microsoft's part to the benefit of the consumer.

I recognize that these provisos flirt with restraint of trade. However, Microsoft has flouted the law without adequate recompense to date, and I believe an extraordinary remedy is in order.

Best Regards,

Tom

"One cannot learn to swim in a field." - Spanish proverb

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